August A. Busch & Co. of Massachusetts, Inc. *and* Teamsters Local Union No. 122 a/w International Brotherhood of Teamsters, AFL–CIO.[1] Cases 1–CA–26475 and 1–CA–27080

November 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issues presented in this case are whether certain unfair labor practice complaint allegations should be deferred to the grievance-arbitration procedures contained in the parties' collective-bargaining agreement pursuant to the principles of *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971), and whether the Respondent unlawfully refused to furnish information requested by the Union in connection with the Respondent's decision to implement a mandatory drug testing program.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.[3]

The complaint in Case 1–CA–26475 alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about ''plant safety issues and other health and safety matters affecting wages, hours, and working conditions of bargaining unit employees.'' In defense, the Respondent asserted in its answer and in motions for summary judgment filed with the Board before the hearing, that the case should be deferred to the grievance-arbitration procedure contained in the parties' collective-bargaining agreement.[4] The judge rejected the request for deferral, proceeded to consider the merits, and found that the Respondent violated Section 8(a)(5) and (1) as alleged. The Respondent excepts, inter alia, to the judge's failure to defer the case to the contractual grievance-arbitration procedure. For the reasons set forth below, we find merit in the Respondent's exception.

The Respondent operates a wholesale beer distributorship in Medford, Massachusetts, where, since 1967, it has recognized the Union as the bargaining representative of the truckdrivers, warehousemen, and helpers employed by the Respondent. Since that time the parties have negotiated a series of collective-bargaining agreements, the most recent of which was effective from December 1, 1988, through November 30, 1991.

The contract contains a broad grievance-arbitration procedure which provides in article VII that:

> The Union or any individual employee or group of employees shall have the right to present grievances relating to the interpretation of the terms of this Agreement to the Employer, and to have such grievances adjusted as provided in the Labor-Management Relations Act of 1947, as amended.

Section 3 of the article provides for the submission of the grievance to arbitration at the election of the Respondent or the Union if a settlement is not satisfactorily reached at the second step, and section 5 states that the arbitrator's decision is final and binding but that it may not ''amend, modify, alter or add to any term of this Agreement.'' The contract also contains the following provision:

ARTICLE XXII

HEALTH - SAFETY - WORKING CONDITIONS

The Company and the Union agree to institute a committee to review issues relating to:

1. health and safety
2. working conditions as affected by the so-called ''Bottle Bill.''

Such committee shall meet no less than monthly, unless otherwise agreed. It is agreed by the parties that every effort will be made to correct those items or situations which the committee deems necessary.

In January 1989,[5] 1 month into the term of the new 3-year contract, an employee in the bargaining unit was killed in a forklift accident. Following an investigation and issuance of citations against the Respondent by the Occupational Safety and Health Administration (OSHA) stemming from the accident, the Union, by letter dated June 7, served on the Respondent a ''demand for negotiations over plant safety issues and other health and safety matters, affecting wages, hours and working conditions of bargaining unit employees.'' The Respondent replied 2 days later by inquiring as to ''precisely what matters you would want to negotiate

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] On April 28, 1992, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent, the General Counsel, and the Charging Party Union each filed exceptions and a supporting brief. The General Counsel and the Charging Party also filed briefs in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[3] We adopt the judge's finding for the reasons stated by him that the Respondent violated Sec. 8(a)(5) by refusing to furnish to the Union the requested information.

[4] The Board rejected the motions without prejudice to the Respondent's right to renew its request before the administrative law judge.

[5] All dates hereinafter are in 1989 unless otherwise indicated.

which either are not already comprehended in the contract or were not discussed during the course of collective bargaining for the last Agreement.'' On June 15, the Union responded by assuring the Respondent that it was not seeking to negotiate about health and safety issues ''already comprehended in the contract'' or about matters that were discussed ''during the course of collective bargaining for the last Agreement.''[6] Rather, as a result of the fatal injury described above and OSHA's related findings of safety violations, the Union explained that it was ''prompted . . . to seek negotiations with respect to worker safety and health in the warehouse operations, truck loading and unloading, truck driving, delivery procedures and training and instruction of bargaining unit employees and safety committee members.'' The Respondent replied on June 19 by stating its belief ''that all issues which you raise can be referred to the contractually established joint management and labor safety committee for resolution set forth in Article XXII.'' Accordingly, the Respondent informed the Union that it saw ''no reason . . . to negotiate these issues separately when there is already in place a contractual mechanism for decision of any outstanding safety dispute.''

On these facts the judge concluded that the present controversy was not appropriate for deferral to the grievance-arbitration machinery of article VII because that article provides only that the Union or employees ''*shall have the right to* present grievances relating to the interpretation of the terms of this Agreement.'' (Emphasis added.) The ''unmistakably clear'' meaning of this language, according to the judge, is that the processing of complaints through the grievance procedure is optional and does not compel the use of that procedure to resolve disputes. Citing *Arizona Portland Cement Co.*,[7] the judge concluded that the instant ''matter is not one properly subject to deferral under *Collyer Insulated Wire* . . ., as there is no contract in existence under which the parties are *mutually bound* by an agreed-upon grievance-arbitration procedure.''

Contrary to the judge, we find no support in *Arizona Portland* for his finding. In that case, the Board declined to defer, not because of the absence of binding language in a grievance-arbitration clause, but because of the absence of an existing contract.

Nor does the *Collyer* doctrine, as it has evolved, support the judge's conclusion. In *United Technologies*, 268 NLRB 557 (1984), the Board reaffirmed the principles of prearbitral deferral articulated in *Collyer* and stated that deferral is appropriate when the following conditions are satisfied: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution. Id. at 558.

Applying these factors to the present case, we find this case is suitable for deferral. Thus, the Respondent and Union have had a productive collective-bargaining relationship for many years,[8] and it is undisputed that the dispute arose within the confines of that relationship. Second, there is no evidence or allegation of employer animosity towards the employees' exercise of protected rights.[9] Further, the Respondent has expressed its willingness to utilize the grievance-arbitration process to resolve the dispute.

Finally, the third and fourth factors are clearly present in this case. The arbitration clause is broad and it encompasses the instant dispute. Under the parties' agreement, a grievance can be filed with respect to matters ''relating to the interpretation of the terms of this Agreement.'' Further, any grievance can be brought to arbitration. Thus, if the dispute involves the interpretation of terms of the agreement, the dispute can be subjected to arbitration.

It is clear that the instant dispute relates to the interpretation of the terms of the contract. The Respondent's refusal to engage in midterm negotiations over health and safety matters is based on its interpretation of the contract, i.e., that the parties intended that safety matters be submitted to and resolved through the joint labor-management safety committee established in article XXII of the contract. The General Counsel and the Union argue that neither article XXII nor any other contract provision could be interpreted as authorizing the Respondent's refusal to negotiate. Specifically, they assert that article XXII provides for a joint-labor management committee which can only review health and safety issues, but has no power to negotiate over those subjects, and does not require the Respondent to implement any committee recommendations.

Accordingly, we find, in agreement with the Respondent, that the dispute turns on an interpretation of article XXII. The Board has long held that, in these situations, the dispute is eminently well suited to resolution through the arbitration process.[10] See, e.g.,

[6] In this regard, the Union specified four safety issues that, it believed, fit those categories and for which it was, therefore, not requesting bargaining.

[7] 281 NLRB 304 fn. 2 (1986).

[8] As noted above, the Union has represented the Respondent's unit employees since 1967.

[9] Cf. *Kenosha Auto Transport Corp.*, 302 NLRB 888 fn. 2 (1991) (deferral inappropriate in light of 8(a)(3) and independent 8(a)(1) allegations).

[10] Contrary to the contentions of the General Counsel and the Union, we do not find the Respondent's contractual defense ''so plainly lacking in merit as not even to raise a colorable claim.'' See

Continued

Collyer, supra, *Roy Robinson Chevrolet*, 228 NLRB 828, 830 (1977); *Southwestern Bell Telephone Co*., 198 NLRB 569, 570 (1972); and *Urban W. Patman*, 197 NLRB 1222 (1972).

Concededly, the contract does not obligate either party to resort to the grievance-arbitration machinery. However, as discussed above, it is the *availability* of that machinery which triggers the deferral doctrine. Where, as here, the dispute is cognizable by the grievance-arbitration machinery, and the other factors favoring deferral are present, the Board's policy is to hold the unfair labor practice case in abeyance, pending resort to the machinery. In *Western Electric*, 199 NLRB 326 (1973), affd. sub nom. *Electrical Workers IBEW Local 2188 v. NLRB*, 494 F.2d 1087 (D.C. Cir. 1974), cert. denied 419 U.S. 835 (1974), the trial examiner found that the arbitration clause, which provided that either party to the contract ''may'' refer disputes to an arbitrator, precluded deferral under *Collyer* because the contract did not mutually bind both parties to submit contractual disputes to arbitration. The Board reversed, noting that under the terms of the contract ''a dispute is arbitral, upon request, after the exhaustion of the earlier steps of the grievance procedure, and the use of the term 'may' merely refers to the option to request or not request arbitration.'' 199 NLRB at 326 fn. 3. We recognize that, in *Western Electric*, resort to arbitration was optional, whereas, in the instant case, resort to the grievance procedure is optional. The rationale is equally applicable, however. So long as an adequate contractual grievance procedure culminating in binding arbitration is *available* to the party seeking a Board adjudication and the other *Collyer* criteria are met, the policies underlying *Collyer* counsel against allowing the complaining party to avoid using that procedure, regardless of whether it seeks to avoid it at the outset or at the step just preceding arbitration.[11]

Accordingly, we believe that deferral of the allegations set forth in Case 1–CA–26475 to the contractual grievance-arbitration mechanism would best effectuate the purposes and policies of the Act, and we shall so order.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, August A. Busch & Co. of Massachusetts, Inc., Medford, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Refusing to bargain collectively with Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, AFL–CIO, by refusing upon request to supply relevant information needed by the Union to perform its duties as collective-bargaining representative of the employees in the unit consisting of drivers, helpers, and warehousemen at its Medford, Massachusetts facility.''

2. Delete paragraph 2(b) and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint in Case 1–CA–26475 is dismissed, provided that:

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, AFL–CIO, by refusing to supply, on request, relevant information needed by the Union to represent the employees covered under its contract with us.

Ram Construction Co., 228 NLRB 769, 774 (1977). See also *Blue Cross Blue Shield*, 286 NLRB 564 (1987).

Further, for the reasons stated by the judge, we reject their contention that deferral would lead to a bifurcated or ''two-tiered'' arbitration procedure which the Board seeks to avoid. See *American National Can Co*., 293 NLRB 901 (1989).

[11] We note that in *Jos. Schlitz Brewing Co*., 175 NLRB 141 (1969), relied on in *Collyer*, the Board found deferral appropriate even though there was no specific finding that the parties were contractually *required* to process grievances through the grievance-arbitration procedure and even though the charging party union had chosen to file an unfair labor practice charge with the Board rather than to file a grievance. Neither the Board nor the trial examiner quoted the exact language of the grievance-arbitration clause. Both simply noted that the collective-bargaining agreement ''provide[d]'' a grievance-arbitration procedure for the settlement of all differences over the interpretation of contractual clauses. Id. at 141, 143. The Board found it merely ''interesting to note'' that a union steward had filed a grievance over the disputed matter because he was ''unaware that the Union had already filed an unfair labor practice charge'' and that the ''grievance was never processed.'' Id. at 142 fn. 1.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish, on request by the Union, information as required by the decision of the Board.

AUGUST A. BUSCH & CO. OF MASSACHUSETTS, INC.

Thomas J. Morrison, Esq., for the General Counsel.
Arthur P. Menard, Esq. and *John Reardon, Esq. (Law Firm of Arthur P. Menard)*, of Chelsea, Massachusetts, for the Respondent.
Stephen R. Domesick, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was heard in Boston, Massachusetts, on October 23, 1991.[1] The consolidated complaint presents two allegations. The first is that since on or about June 19, 1989, the Respondent has unlawfully refused to negotiate with the Union about various matters relating to health and safety, thereby violating Section 8(a)(5) and (1) of the National Labor Relations Act. The second is that the Respondent, since on or about January 30, 1990, has unlawfully refused to furnish certain information to the Union, also in violation of Section 8(a)(5). The answers to the consolidated complaints deny material substantive allegations contained therein.[2]

Briefs were filed by all parties on or about January 17, 1991. Having carefully considered the briefs and the entire record, I have reached the following findings of fact,[3] conclusions of law, and recommendations.

I. BASIC FACTS RELATED TO CASE 1–CA–26475

The Respondent operates a facility in Medford, Massachusetts, where it engages in the wholesale distribution of beer. Since 1967, the Respondent has recognized the Union as the exclusive bargaining representative of its drivers, helpers, and warehousemen at the Medford location. Although the record indicates that the parties have negotiated a succession of bargaining agreements since 1967, the only agreements in evidence are the ones executed for the periods December 1, 1982–November 30, 1985, December 1, 1985–November 30, 1988, and December 1, 1988–November 30, 1991.

In January 1989,[4] a bargaining unit employee was killed when a forklift truck fell on him. On June 7, after an Occupational Safety and Health Administration investigation and the issuance of citations against Respondent, an official of the Union wrote to the Respondent, making reference to the accident and the OSHA citations and serving a ''demand for negotiations over plant safety issues and other health and safety matters, affecting wages, hours and working conditions of bargaining unit employees.'' By letter dated June 9, Arthur Menard, counsel for Respondent, inquired as to the identity of the matters the Union wished to negotiate which ''either are not already comprehended in the contract or were not discussed during the course of collective bargaining for the last agreement.'' The letter ended, ''Please understand that we are not refusing to reopen, but merely require more specificity before we can answer your request.''

On June 15, Stephen Domesick, the Union's counsel, wrote to Menard, renewing the request to bargain; stating that the Union's proposed discussion did not contemplate subjects already comprehended by the contract or meaningfully discussed during its negotiation; and conceding, accordingly, that Respondent might properly decline to bargain about ''defective fork lifts, open pallets on end-loader trucks, case load limitations up stairs, the stacking of empty barrels on trucks and graduated stops.'' The letter went on to specify the proposed subjects of bargaining: ''worker safety and health in the warehouse operations, truck loading and unloading, truck driving, delivery procedures and training and instruction of bargaining unit employees and safety committee members.'' Union Attorney Domesick testified that, ''to [his] recollection,'' no safety issues were discussed during negotiations for the 1988–1991 contract other than the ones specified in his letter as not being subject to current bargaining.[5]

The June 19 reply by Menard stated Respondent's belief that the issues raised by the Union could be referred to a contractually established committee for resolution.[6] Menard further stated that if the Union was dissatisfied with the results of the suggested approach ''or still believes it has a grievable issue relative to safety, of course, the Company would be willing to arbitrate such an issue. Moreover, if the Union is of the view that the Company is incorrect in its judgment that such matters should be referred to the safety committee, then, of course, the Company would be willing to arbitrate the dispute over the propriety of the referral of such matters to that committee.'' Menard finished by stating that he saw no reason to ''negotiate these issues separately when there is already in place a contractual mechanism for discussion of any outstanding safety dispute.''[7]

[1] The charge in Case 1–CA–26475, was filed on June 26, 1989, and a complaint was issued in that case on August 16, 1989. The charge in Case 1–CA–27080 was filed on February 16, 1990, and a complaint was issued on February 14, 1991. An order consolidating the cases for hearing was issued on February 14, 1991, as supplemented on August 26, 1991.

[2] The answers agree, however, that the Respondent has been at all pertinent times an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Errors in transcript have been noted and corrected.

[4] All dates in this section refer to 1989.

[5] Domesick was the only witness in this proceeding.

[6] Art. XXII of the 1988–1991 agreement, entitled ''Health-Safety-Working Conditions,'' provided, as did the preceding agreements, for the creation of a labor-management committee to ''review issues relating to: 1. health and safety 2. working conditions, as affected by the so-called 'Bottle Bill.''' The article provided for monthly meetings, unless otherwise agreed, and further stated the intention of the parties that ''every effort will be made to correct those items or situations which the committee deems necessary.'' The record is silent as to the history of the committee, although an August 16 letter from Respondent, see infra, indicates that such a committee did not then exist. On brief, the Charging Party represents that ''[t]his committee has met only sporadically, and not at all for at least five or six years.''

[7] The grievance-arbitration clause (art. VII) of the agreement is specific in its application: ''The Union or any individual employee or group of employees shall have the right to present grievances relating to the interpretation of the terms of this Agreement to the Em-

Continued

On August 16, a company official wrote to the union secretary-treasurer, proposing ''[p]ursuant to Article XXII of the Collective Bargaining Agreement . . . to schedule meetings of the Safety Committee . . . for the third Thursday of every month, commencing with September 21, 1989.'' He enclosed an ''Agenda,'' listing ''Review of August Accidents,'' ''Safety Theme for November,'' and ''Facility Safety Walk Through,'' and he invited the Union to propose additional agenda items. Also on August 16, the Region issued its complaint in Case 1–CA–26475. A series of prickly letters between Domesick and Menard followed, having to do primarily with procedural matters.

In the end, no committee was ever formed pursuant to article XXII. In addition, no negotiating sessions, as requested by the Union in its letters of June 7 and 15, have ever been held.

General Counsel introduced through Domesick evidence of three instances in which the parties had, after discussion, reached accords on issues relating to new operational needs which arose during the period of the bargaining relationship.

II. CONCLUSIONS AS TO CASE 1–CA–26475

Prior to the hearing, Respondent filed two motions for summary judgment with the Board, on both occasions arguing, inter alia, that this case should be deferred to the parties' grievance-arbitration procedure. In both instances, the Board denied the motions for deferral ''without prejudice to the Respondent's right to renew its request before the administrative law judge.''

In making his request for deferral to arbitration at the hearing, counsel for the Respondent stated, inter alia, that in the proposed arbitration, the arbitrator would determine whether, ''by agreeing to the fact that the [article XXII] committee would have recommendatory power, has the union waived its right to insist safety issues be brought forward in any other fashion, other than to the committee.'' On brief, counsel asserts, ''To determine whether or not the Union, even if it had the right to demand mid-term negotiations, has waived the right to negotiate during the term of a collective bargaining agreement over safety issues is a question that can only be determined by interpretation of Article XXII of the collective bargaining agreement between the parties.''

When the Board in *Collyer Insulated Wire*, 192 NLRB 837 (1971), as reaffirmed in *United Technologies Corp*., 268 NLRB 557 (1984), enunciated a doctrine of deferring labor-management disputes, at least initially, to the arbitral process, it did so predicated upon one fundamental tenet: that the parties had agreed that they would resolve their disputes by the method stated in the contract. In *Collyer*, supra at 842, 843, the Board wrote, ''[T]he contract between Respondent and the Union unquestionably obligates each party to submit to arbitration any dispute arising under the contract and binds both parties to the result thereof . . . . When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function.'' Again, in *United Technologies Corp*, supra at 559–560, the Board emphasized that ''[w]here an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray . . . . Certainly great damage could be done to the entire system of grievance arbitration, and to the process of collective bargaining, if parties believed that they could ignore an agreed-upon method of settling disputes.''

The difficulty that this language presents here is that in the instant case, the Union has made no commitment to exclusively use the grievance arbitration procedure to resolve its disputes with the Respondent. The operative language of article VII—and we must assume that the words were chosen with care—reads: ''The Union or any individual employee or group of employees *shall have the right to* present grievances relating to the interpretation of the terms of this Agreement to the Employer, and to have such grievances adjusted . . . .'' (Emphasis added.) The unmistakably clear literal language of the provision, accordingly, imposes no contractual obligation upon the Union to process its complaints through the grievance arbitration procedure.[8] To force the Union to do so would effectively change the words ''shall have the right to'' to ''must.'' That, for *Collyer* to apply, there has to be in place a grievance procedure which obligates both parties is indicated by the Board's language in *Arizona Portland Cement Co*., 281 NLRB 304, fn. 2 (1986): ''We agree with the judge that this matter is not one properly subject to deferral under *Collyer Insulated Wire* . . . as there is no contract in existence under which the parties are *mutually bound* by an agreed-upon grievance-arbitration procedure.'' (Emphasis added.) Accordingly, I conclude that deferral to arbitration is inappropriate in this case.[9]

ployer . . . .'' The penultimate sentence in the procedure states, in part, that ''the Arbitrator shall have no power to amend, modify, alter or add to any term of this Agreement.''

It may also be noted at this point that art. XXV of the agreement, after reciting its term, states that the agreement ''shall not be reopened by either party for any reason whatsoever . . . .''

[8] Compare the relevant clauses in *Collyer*, 192 NLRB at 839:

> [T]he grievance machinery ''*shall be adopted* for any complaint or dispute . . . which may arise between any employee or group of employees and the Corporation. . . . All questions, disputes or controversies under this Agreement *shall be settled and determined solely and exclusively* by the conciliation and arbitration procedures provided in this Agreement.'' [Emphasis added.]

In *United Technologies*, the pertinent language read (268 NLRB at 557 fn. 3):

> In the event that a difference arises between the company, the union, or any employee concerning the interpretation, application or compliance with the provisions of this agreement, an earnest effort *will be made* to resolve such difference in accordance with the following procedure which must be followed. [Emphasis added.]

[9] I do not, however, agree with the General Counsel and the Union that deferral is also inappropriate under the reasoning of *American National Can Co*., 293 NLRB 901 (1989), and other cases, which reject deferral in order to avoid a ''two-tiered'' process. If this case were to be deferred to arbitration, the only issue would be whether the adoption of the safety and health clause constitutes a waiver of the Union's asserted statutory right to seek midterm bargaining. If the arbitrator found such a waiver, that would be the end of the case. If he found no such waiver, and also concluded that the Union did not have to exhaust its remedies under the clause before pressing its Board charge, the Union would be back before the Board, presumably as it would be in most *Collyer* cases in which the arbitrator rules in favor of the union. This is not the sort of ''two-tiered'' process which the Board has in the past attempted to avoid.

That brings us to the question of whether a union has a right to bargain, during the term of an agreement, over matters not contained in the contract or discussed during its negotiation. The Board has long held, with court approval, that Section 8(d) of the Act (which narrows the bargaining obligation so as not to ''requir[e] either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period'') does not ''relieve[] an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract.'' *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952), enfg. 94 280 NLRB 824, 827 (1951); *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992).

The next question, then, is whether article XXII of the agreement, which establishes a committee to, inter alia, ''review issues relating to health and safety'' and to make ''every effort . . . to correct those items which the committee deems necessary'' falls within the Jacobs rule go as to obviate the necessity for the Respondent to bargain as requested. The answer seems clear.

The Board issued four opinions in *Jacobs*, and the plurality opinion of Members Houston and Styles contains this statement of their holding: ''Those bargainable issues which have never been discussed by the parties, and which are in no way treated in the contract, remain matters which both the union and the employer are obliged to discuss at any time.'' 94 NLRB at 1219. As earlier noted, the enforcing court approved a similar standard (''neither discussed nor embodied in any of the terms and conditions of the contract'').

Can it be plausibly said that the ''subjects'' which the Union wished to discuss here were ''embodied in any of the terms and conditions of the contract'' by virtue of article XXII? My own answer to that question is in the negative. By agreeing to appoint a committee which would discuss ''health and safety'' matters, the parties did not thereby ''treat'' or ''embody'' in the bargaining contract the issues raised by the Union (nor is there any evidence that those issues were ever discussed during negotiations). *Jacobs* does not address the question in terms of whether article XXII constituted a ''clear and unmistakable waiver'' of the duty to bargain about these subjects, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), but later cases adopt that as the appropriate doctrinal approach. *NL Industries v. NLRB*, 536 F.2d 786, 790 (8th Cir. 1976), enfg. 220 NLRB 41 (1975), and *National Broadcasting Co.*, 241 NLRB 920, 921 (1979). It should be noted that, depending on the (unknown) operational procedure adopted by the committee, the Union's requests for safety and health measures might not even get to the point at which the committee would be required to make ''every effort'' to bring the Union's requests to Respondent's attention; the mere existence of the committee, in other words, carries no guarantee that the safety measures sought by the Union would even be formalized for presentation to the management.

In these circumstances, I conclude that article XXII does not operate to preclude the Union from bargaining about the matters listed in Domesick's June 15 letter.

The final argument advanced by Respondent relies on article XXV, which provides that the contract ''shall not be reopened by either party for any reason whatsoever.'' This clause is not a ''clear and unmistakable'' waiver of the statutory right; as the Union argues, ''reopening'' normally connotes revision of existing terms. See, e.g., *General Electric Co.*, 296 NLRB 844 fn. 10 (1989). It may be noted, for purposes of a fortiori analogy, that in *Michigan Bell Telephone Co.*, supra, the Board found the following ''zipper'' clause to be ''ambiguous'':

> This Agreement is agreed upon in final settlement of all demands and proposals made by either party during recent negotiations, and the parties intend thereby to finally conclude contract bargaining throughout its duration.

I find, therefore, that the ''shall not be reopened'' clause did not effect a clear and unmistakable waiver of the Union's statutory right to bargain about matters not contained in the contract or previously discussed during bargaining.[10]

Thus, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain about safety matters as requested by the Union.[11] I must say that the Union's demand was less than explicit, but Respondent at no time raised any question about the generality of the demand. The last bargaining contract in evidence was to expire in the month after the hearing in this case. It may well be that the bargaining for the new agreement has mooted the particular demands made here, and the bargaining agreement may have altered the ground rules. I have had no communication from Respondent broaching the question of mootness, and I shall enter the customary remedial order.

III. BASIC FACTS RELATED TO CASE 1–CA–27080

This case, raising the question of whether Respondent has unlawfully refused to furnish information to the Union, has a rather intricate background.

On September 22, 1989, the law firm which represents Anheuser-Busch, Inc., Respondent's parent, wrote to the Federal Highway Administration (FHA) requesting an advisory opinion as to whether the Federal Motor Carrier Safety Regulations (FMCSR) were applicable to its Wholesale Operations Division, which is composed of Respondent and 11 other wholesale distribution facilities nationwide. It is apparent from the thrust of the letter (''a brief,'' as union counsel characterized it at the hearing) that the parent corporation was interested in soliciting an affirmative reply from FHA, so that it could clarify that its wholesale drivers were re-

I recognize that neither the General Counsel nor the Union has advanced the foregoing argument for resolution of the deferral issue. In applying *Collyer*, however, one must begin by examining the grievance-arbitration clause in the light of *Collyer*'s fundamental underlying premise of mutuality of commitment. The question of whether the Board should defer application of its jurisdiction is a question peculiarly and institutionally for the Board, and whether deferral is appropriate should not depend on whether the General Counsel or the Union has advanced an argument which is present and which undermines *Collyer*'s application.

[10] For a ''clear and unmistakable'' zipper clause, see *GTE Automatic Electric*, 261 NLRB 1491 (1982).

[11] I do not, however, rely on the fact that, on three previous occasions, Respondent entered into midterm agreements with the Union. What Respondent may have done to further its own interest on those occasions does not put a conclusive gloss on the contract. Cf. *Johnson-Bateman Co.*, 295 NLRB 280 (1989).

quired to obtain medical certification, including drug testing, and to comply with other FMCSR rules. In the September 22 letter, the parent corporation's counsel treated the 12 distribution facilities, with some exceptions, as operating identically. On November 15, 1989, FHA wrote to counsel opining, essentially, that on the facts presented, the transportation by the wholesale drivers would constitute ''interstate commerce'' within the meaning of that term as defined in the Motor Carrier Safety Act of 1984.

On December 1, 1989, the assistant director for labor relations for the parent company sent a letter to the Charging Party Union, stating that the company had received notice from FHA that it must comply with the FMCSR; briefly setting out the requirements of the regulations; and attaching the FHA opinion letter.

By letter dated January 15, 1990, Attorney Domesick replied to the assistant labor relations director. After stating that the bargaining agreement made no provision for the sort of drug testing referred to in, the December 1 letter, i.e., as part of a ''biannual physical,'' and asserting that drug testing is a mandatory subject of bargaining (citing *Johnson-Bateman Co*., supra), Domesick set out 26 requests for information and documents ''[i]n order to determine whether the Company's actions require bargaining, to prepare for such bargaining as may be required, in order to determine whether a grievance exists and/or to determine the merits of such a grievance.'' The requests bore upon various facets of the manner in which Respondent conducted its business, as well as how Respondent's parent and affiliates did business with Respondent.

The January 30, 1990 reply to this letter was written not by its addressee, but rather by Attorney Menard, who took the position that the *Johnson-Bateman* case was irrelevant and asked for ''other case law supporting your proposition or supporting your demand for information.'' In his response of February 6, 1990, Domesick explained that he was seeking ''specific facts'' relating to the interstate or intrastate nature of Respondent's operations and, thus, to the applicability of FMCSR to *Respondent's* drivers, and he renewed the January 15 request.

On February 15, 1990, Menard sent Domesick a copy of the request for advisory opinion originally made to FHA (which thus satisfied the first of Domesick's 26 requests), saying that it would fully answer his questions and inviting Domesick to indicate whether he had other questions. The Union filed its charge in this case on February 16, 1990. Domesick wrote Menard on February 23 that the furnished document was ''incomplete,'' ''insufficient,'' ''brief, generalized, misleading and, in my view, inaccurate.'' Domesick asserted his belief that Respondent's operations ''are wholly intrastate.'' He also made reference to the NLRB charge on file, and he renewed his request for the information. There appears to have been no further correspondence on this subject.

Although the parent corporation's December 1, 1989 letter had stated that various rules would take effect in that month, in fact nothing was done for a year. Eventually, to meet some specific problems arising in this area relating to certain of Respondent's employees, a January 1991 agreement was worked out.

On September 17, 1991, however, the parent corporation wrote the Union that ''pursuant to the requirements of the Federal Highway Administration's regulations,'' the Company would begin ''random and nonsuspicion-based postaccident testing'' at various times in November 1991 and January 1992.

IV. DISCUSSION AND CONCLUSIONS: CASE 1–CA–27080

A statutory bargaining representative has both the authority and the obligation to act in what it reasonably perceives to be the best interests of the employees it represents. This duty and power to represent bargaining unit employees may find expression in varying formats, ranging from information discussions with employers to the filing of grievances to judicial litigation. One of the several rights found in Section 8(al(5) by the Board and courts to assist unions in these responsibilities is the right to require employers to provide information relevant and necessary to the performance of a statutory duty. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956).

Over the years, standards have been developed in this area. Where the information sought relates to ''core'' terms and conditions of employment within the bargaining unit, no specific showing of relevance is required, *Atlas Meal Parts Co. v. NLRB*, 660 F.2d 304, 309–310 (7th Cir. 1981). When the requested information extends to matters outside the realm of the unit, ''relevance is required to be somewhat more precise.'' *Ohio Power Co.*, 216 NLRB 987, 991 (1975). ''[A] reasonable belief'' as to the usefulness of the information sought has been held to be sufficient. *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531, 535 (4th Cir. 1985). The ''relevance'' of the request is governed by ''a liberal discovery-type standard,'' *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967), i.e., ''the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' Ibid.

The General Counsel takes the position that the information requested by the Union here falls into the nonpresumptive second category, but there can be little doubt of its relevance. The Respondent's parent had solicited from a Federal agency, and was about to impose upon union-represented employees, an opinion that, pursuant to Federal law, the drivers would be subject to periodic drug testing. Obviously, this imposition could have directly affected the working conditions—indeed, the tenure—of the unit employees. The Union chose to challenge what it perceived, on the basis of its belief, to be an unfounded declaration by FHA. In order to elicit documented support for this belief, the Union sought information from the Respondent. I find no reason to conclude that the Union was not entitled to this information. *Sonat Marine*, 279 NLRB 100 (1986) (union entitled to factual basis for conclusion that employees were supervisors).[12]

[12] I note that the December 1, 1989 letter from the parent corporation, Anheuser-Busch Companies, Inc. (ABI), to the Charging Party precipitated the Union's January 15, 1990 request for information upon which this segment of the proceeding is predicated. That request was addressed to ABI, but the complaint here names the wholly owned subsidiary, August A. Busch & Co. of Massachusetts, Inc. (ABM), as the Respondent. The Respondent has raised no issue based upon these facts, either at the hearing or on brief. That may be because Attorney Menard, who represents ABM, authored all subsequent correspondence on the matter, and, by February 15, 1990, was captioning the correspondence as ''August A. Busch & Co. of Massachusetts Inc. and Teamsters Local Union No. 122 Re-

There can be an assortment of arguments available to an employer to advance against requests for information, and, at the hearing, Respondent explored several such avenues. The argument section of Respondent's brief, however, has narrowed its contentions to three, and I shall, accordingly, address only those.

Respondent's first contention is that ''where the Union is pursuing litigation before the Board, or where it is seeking information for purposes of EEOC litigation, or where it is seeking information for other litigation, neither the courts nor the Board have recognized that this is the type of statutory function which would entitle it to the information requested.'' The Board has expressly held to the contrary, *Westinghouse Electric Corp.*, 239 NLRB 106, 110–111.[13] Furthermore, it is quite clear that the Union has not suggested that its only interest in obtaining the requested data is to litigate.

True enough, Attorney Domesick has not been completely consistent about his intentions. In his request letter, as earlier described, Domesick stated that the Union desired the information ''[i]n order to determine whether the Company's actions require bargaining, to prepare for such bargaining as may be required, in order to determine whether a grievance exists and/or to determine the merits of such a grievance . . . .'' At the hearing, he said initially that ''our first approach would have been, armed with the information, to submit the information to [the Office of Motor Carrier Safety within the FHA] . . . in order to obtain an unvarnished and unpredictable answer.'' ''Alternatively,'' he had discussed with his client other routes, such as ''beginning litigation in ; the Federal system'' or the state judicial system. Subsequently, however, Domesick testified that what he ''frankly . . . believed would occur, that if the company developed that information for us, we would be able to reach agreement that these operations were not covered by [the Federal regulations],'' which would obviate the need for formal action.

It seems entirely likely that if a capable lawyer like Domesick received information which he considered favorable to his cause, his first notion would have been to attempt to convince Menard, his ''business friend'' of 20 years, to reach the kind of accommodation which, the record shows, they were in the habit of working out.[14] In any event, however, whether he contemplated resolution by informal settlement, by trying to persuade FHA to exempt the Medford facility from its previous general opinion, or by litigating, Domesick would surely have been acting in a manner and for a purpose appropriate to and comprehended by the Union's statutory responsibility. Just as a union is entitled to request information in order to determine whether to file a grievance, *NLRB v. Acme Industrial Co*., supra, so it may seek information for the purpose of persuading an employer, short of formal action, to change course.

Respondent's second argument on brief is that the information sought was not ''necessary,'' since Domesick and the Union were ''extremely knowledgeable'' about the Respondent's operation. There is, of course, a serious difference between what the Union *thinks* it knows about Respondent's (and its parent's) business, and having in hand actual confirmation of that belief from the Company itself. With the latter, Domesick would not either have to fence with the Respondent or, if it came to that, provide unsubstantiated facts ''upon information and belief'' to a busy government agency. The data sought was ''necessary'' within any reasonable sense of that word.

The final argument proffered by Respondent is that the Union ''has waived'' and ''has rendered moot any real issue in this case'' by entering into a side agreement on January 29, 1991, which required drug testing. The fact that the Union entered into a settlement which accepted the notion of requiring certificates of ''negative controlled substance test'' to save the jobs of six drivers does not strike me as a waiver, given that the Union simultaneously had on file a charge with the Board accusing Respondent of withholding information deemed necessary to win its cage against the requirement for periodic drug testing. A waiver of statutory rights must, as indicated, be ''clear and unmistakable.'' *Metropolitan Edison Co. v. NLRB*, supra. And any claim of ''mootness'' must surely be refuted by the fact that in September 1991, the Respondent's parent notified the Union that the Company intended soon to be implementing new FHA regulations putting in place a requirement for ''random and non-suspicion-based post-accident'' testing for drivers such as those employed by Respondent.

There was a rather complicated argument raised by Respondent at the hearing to the effect that a Massachusetts statute has adopted the drug testing; requirements of the FHA, so that, the argument goes, it is a matter of indifference whether Respondent is considered to be in ''interstate'' or ''intrastate'' commerce. Although Respondent makes reference to this issue in ''The Facts'' section of its brief, it is nowhere to be found under ''Argument.'' I shall therefore decline to go further into the matter myself, other than to say that the Union's contention seems persuasive that Massachusetts law requires either a public hearing or public notice in order for the State's original incorporation of Federal regulations to also incorporate subsequent changes in those regulations.

Finally, I note that neither at the hearing nor on brief has the Respondent entered specific objection to any of the 25 outstanding questions posed by the Union. Having heard no such claims, I shall assume that all such questions are pertinent to the issue.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

---

quest for Information (Application of W T Interstate Regulations),'' a caption which union counsel had first adopted in his preceding letter of February 15, 1990. Attorney Menard's brief states, in reference to a letter written by him to attorney Domesick, that ''the Company replied through its counsel.'' It seems clear that, without so specifying, ABM was agreeing to act as agent for ABI in this transaction, and both parties understood that relationship.

[13] *Minnesota Mining Co.*, 261 NLRB 27, 29–30 (1982), cited by Respondent, discusses *Westinghouse* but does not overrule it. In *Minnesota Mining*, the Unions ought the information only for *defense* of a lawsuit; here, legal action would likely be the last resort for the Union, as discussed.

[14] On brief, union counsel states that upon receipt of the requested information, ''the Union would be able, inter alia, to bargain with the contracting employer, ABM, to submit a joint request for an advisory opinion letter or to condition bargaining upon obtaining an FHA opinion letter dealing with ABM's operations.''

3. By, in and after June 1989, refusing to bargain with the Union about various matters relating to safety, and by, since on or about January 30, 1990, refusing to furnish to the Union information necessary and relevant to the performance of its statutory responsibilities, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I recommend that Respondent be required, on request by the Union, to (1) bargain in good faith about safety matters, as delimited in the foregoing decision, and (2) provide the information requested by the Union in its letter of January 15, 1990.

I shall also recommend that a cease-and-desist order be issued, and that posting of the traditional notices be required.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, August A. Busch Co. of Massachusetts, Inc., Medford, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) by refusing on request to supply relevant information needed by the Union to perform its duties as collective-bargaining representative of the employees in the unit consisting of drivers, helpers, and warehousemen at its Medford, Massachusetts facility, and by refusing to bargain with the Union about mandatory subjects of bargaining when required by law to do so.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish, on request by the Union, information as specified in the remedy section hereinabove.

(b) Bargain, on request by the Union, as specified hereinabove.

(c) Post at its location in Medford, Massachusetts, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''